



RAVALLI COUNTY ATTORNEY

205 Bedford Street, Suite C, Hamilton, MT 59840-2853
Phone (406) 375-6222 Fax (406) 375-6328

TO: Karen Hughes, Planning Department

CC: Chris Duerksen and Don Elliott, Clarion & Associates
Ravalli County Commissioners
Ravalli County Clerk & Recorder

FROM: George Corn

DATE: June 27, 2008

RE: Zoning Questions

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Ravalli County Commissioners

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Dear Karen,

You have presented to the County Attorney's office various questions that have been raised in the process of preparing draft zoning regulations for Ravalli County. Questions have also been submitted to us from Clarion, the Clerk & Recorder, and the Commissioners. This memo addresses these questions to the extent possible at this time. Please note that while many of these questions present matters of first impression under Montana law, the answers have been as thoroughly researched as possible.

1. Do the statements regarding private property rights set forth in Ravalli County's Growth Policy prohibit adoption of lawful zoning?

No. The applicable use for Ravalli County's adopted growth policy in regard to zoning is set forth in §76-1-605, MCA. This statute states, in applicable part:

Use of adopted growth policy. (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the:

...

(c) adoption of zoning ordinances or resolutions.

(2)(a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.

(b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

County zoning is specifically authorized by §76-2-201, MCA. How closely such zoning has to comply with the provisions of a growth policy has been addressed frequently by the Montana Supreme Court since the 1980's. *See, e.g., Little v. Bd. Of County Cmmrs*, (1981), 193 Mont. 334, 631 P.2d 1282. In fact, §76-1-605(2) was specifically inserted by the legislature in 2003 in part to address this particular question.

It is well-settled law in Montana that the statutes governing growth policies and zoning regulations must be considered together. Since a growth policy is a "condition precedent" to permanent zoning, a governing body must consider the growth policy in enacting its zoning. However, there is nothing in the statutes supporting the argument that growth policy provisions may deny the authority of a county to enact zoning, because zoning is the primary way a county implements a growth policy. Any other interpretation would upset the interaction between the planning aspect of a growth policy and the regulatory aspect of zoning.

Ravalli County's Growth Policy specifically states that it recognizes those private property rights "[c]onsistent with federal and state constitutional protections." Accordingly the reiteration of those rights in the Growth Policy does not preclude enactment of lawful zoning regulations under §76-2-201 *et seq*, MCA.

2. Do the provisions of §76-3-509, MCA, authorizing "local option cluster development regulations" require enactment of such regulations to zone for cluster development?

No. Zoning (Title 76, Chapter 2) and subdivision regulation (Title 76, Chapter 3) are closely interrelated but separate and distinct legislation serving different purposes. *See, e.g., Shoptaugh v. Board of County Com'rs of El Paso Cty.*, 543 P.2d 524 (Colo. Ct. of Appeals, 1976); *see also* discussion on this issue in *Aber v. The Planning & Zon. Comm*, 1994 ML, 41, 48 (Mont. Dist. Ct. 1994). Subdivision control is concerned with the initial division of undeveloped land, while zoning more specifically regulates the further use of the land. *Town of Sun Prairie v. Storms*, 327 N.W.2d 642 (Wis. 1983).

Section 76-3-509, MCA, specifically allows a governing body to adopt regulations to promote cluster development subdivisions and establish a subdivision review exemption under §76-3-608, MCA. Ravalli County has not enacted any regulations under §76-3-509, and nothing in Montana statute requires such regulations in order to enact valid zoning with cluster options. Section 76-3-608(3), MCA, confirms this distinction by specifying that the primary subdivision review criteria applies unless "the governing body has established an exemption pursuant to subsection (6) [growth policy and zoning]...*or* except as provided in §76-3-509 [local option cluster development]..." (emphasis added). In other words, the exemption contemplated by 76-3-509 is distinct from any exemptions which may be created through the zoning process.

Given the above, I can find no requirement in Montana law that the County must adopt cluster development subdivision regulations in addition to zoning regulations. Under §76-2-202, zoning must be designed, *inter alia*, to "provide adequate light and air," "prevent overcrowding of the land," and "avoid undue concentration of populations." These purposes have been held to be consistent with cluster development options in zoning regulations. *See, e.g., Orinda Homeowners Committee v. Board of Supervisors*, 11 Cal. App. 3d 768, 773 (Cal. App. 1st Dist. 1970). It appears that zoning regulations may

provide cluster development options without separate subdivision exemption regulation under §76-3-509, MCA.

3. What are the guidelines for the county zoning “protest provisions” in §76-2-205, MCA?

Several questions have been presented regarding the county zoning protest provisions. These provisions are set forth in §76-2-205, MCA, and an overview of the law in this area follows which addresses these questions:

Qualified Persons for Zoning Protests

Under § 76-2-205(5)(d), MCA, the criteria for protesting the creation or amendment of a zoning district or zoning regulations proposed under 76-2-201 *et seq* is whether 1) a person owns real property within the district; **and** 2) their name appears on the last completed assessment role of the county. As further set forth in §76-2-205(6), the zoning may not be adopted if either 1) 40% of the freeholders within the district protest; **or** 2) freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes or as forest lands protest.

Freeholders & Agricultural Protests

In regard to determining how protests are counted (*i.e.*, defining “freeholders”), several Montana Attorney General opinions have addressed this issue. *See* 46 MT A.G.Op. 22 (1996); 37 MT A.G.Op. 47 (1977). For purposes of county zoning, each “freeholder” in the district gets one protest vote **without** regard to the number of parcels the freeholder owns within the district. 37 MT A.G.Op. 47 (1977). The 1996 Attorney General Opinion referenced above also addresses in detail how the heightened 50% protest provision for agricultural users is applied, concluding that the combined title ownership must represent 50% of the total property ownership within the proposed zoning district. That opinion additionally concluded that *all* owners of jointly or commonly held property must sign the protest before that jointly held real property within the district may be included in the protest.

Definition of Zoning District

I have also been asked how to define “district” for county zoning protest provisions. I begin by noting that the Montana attorney general opinions referenced above explained that in Montana, the statutory protests provisions specifically apply to creation of county zoning as well as amendment; therefore, these protest provisions more accurately constitute “consent provisions” for the initial enactment of zoning in Ravalli County. §76-2-205(5)(d); *see also* 46 MT A.G.Op. 22 (1996).

Per the express terms of §76-2-205(5)(d), MCA, qualified persons may protest either the “creation of the zoning district” **or** the “zoning regulations.” The current draft Ravalli County zoning regulations propose creation of county-wide zoning affecting the unincorporated area of the County. This is the same geographic area affected by the current interim zoning regulation which is “applied to all of the unincorporated area of Ravalli County.” *See* Resolution No. 2038. Accordingly, the current district to be zoned and regulated is the unincorporated area of Ravalli County.

The plain reading of the protest provisions of §76-2-205 is thus that protests may be made by qualified persons residing in the unincorporated area, or district, that will be affected by adoption of the

regulations. This is again consistent with Ravalli County's current interim zoning district, which was voted on by residents of the unincorporated area. Therefore, under the current regulations proposed, protests could be made by persons owning real property within the unincorporated area to be zoned if those persons' names appear on the last completed assessment roll of the county.

With that being said, §76-2-202, MCA, generally authorizes county commissioners to establish "zoning districts and regulations for all or part of the jurisdictional [unincorporated] area." Should the current draft countywide zoning regulations be modified to propose an initial district or regulation for only part of the unincorporated area, the area to be zoned by the modified regulations would then become the district for purposes of the protest provisions in §76-2-205, MCA.

To avoid confusion about this issue in the future as the draft regulations are modified, I recommend that the regulations contain a description of the zoning district as the overall area to be zoned by the regulations. The regulations should then specify that the zoning classifications will be uniform within the zoning district in order to comply with Montana law. Thereafter, if the defined overall area to be zoned by the proposed regulations changes, the boundaries of the zoning district being created will change accordingly.

School Districts as Protest Districts

Several questions have been asked regarding whether the commissioners could define the "zoning district" according to school district boundaries for purposes of the protest provisions of §76-2-205, MCA. I have found no authority under Montana law allowing the commissioners to define "district" differently for protests than for zoning regulation; the protest district should be the same as the area being zoned. The protest provisions articulated in §76-2-205, MCA, clearly specify that property owners in the district to be zoned whose names appear on the last completed assessment roll may protest either the district created or the proposed zoning regulations, and I therefore conclude that defining the protest district differently from the boundaries of the zoning district itself is not possible.

However §76-2-202(1)(a) specifically authorizes the establishment of "zoning districts" for all or part of the jurisdictional area. Accordingly, the statutes do not preclude creating separate zoning districts according to school district boundaries, provided each of these "districts" has a uniform zoning classification system per §76-2-202(5). Again, the current draft zoning regulations propose a uniform classification system throughout the entire unincorporated area of Ravalli County. If separate zoning districts with unique classification systems were proposed for each school district, such proposed districts would have to be examined to determine whether they met the requirements for uniformity for zoning districts set forth in §76-2-202, MCA.

4. What are the obligations and opportunities for cooperation on city/county planning concerns?

Generally §76-2-310, MCA, governs extending municipal zoning outside the city boundaries. Under that statute, zoning can only be extended if the surrounding county has not adopted zoning or subdivision regulations. Although certainly decisions made within a city or township may affect those in

unincorporated areas and vice versa, the statutory scheme in Montana establishes a separation between county and municipal regulation in the area of zoning. Incorporated and unincorporated areas are responsible for establishing their own zoning regulations, unless agreements exist to the contrary.

There are various statutory methods to accomplish this goal, such as §76-1-111, MCA (allowing city and town representation on county planning boards by agreement); §76-1-112, MCA (authorizing consolidation of city and county planning boards); and §7-2-4201, MCA (allowing annexation of nearby land to incorporated cities). Thus, cities or towns desiring more input into zoning in unincorporated areas have various remedies to explore to gain input into that process which do not violate the regulatory scheme established by the legislature, and it is appropriate for the governing bodies of cities to explore those options with the county as they see fit.

A final question on this issue was asked regarding the language of §76-2-203(3), MCA. This statute states that county zoning regulations “must, as nearly as possible, be made compatible with the zoning ordinances of the municipality within the jurisdictional area.” I located no case law interpreting this language, and so conclude that the plain language should be applied as written—the zoning ordinances of municipalities should be taken into consideration in the zoning process to achieve as much compatibility as possible given all other considerations.

5. Is the County prohibited from zoning agricultural activities under §76-2-901 *et seq*, MCA?

Yes, as to existing agriculture activities and no, in regard to future agricultural activities. In regard to the application of §76-2-901 *et seq*, MCA (Agricultural Activities), these statutes state that the legislature intends to “protect agricultural activities from governmental zoning and nuisance ordinances.” §76-2-901(2), MCA. Further, a county “may not adopt an ordinance or resolution that prohibits any **existing** agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town.” §76-2-903, MCA., emphasis added. On their face, these statutes are designed to protect existing agricultural activities, and this protection is effected by the nonconformity provisions of the current proposed draft regulations.

These statutes were adopted in 1995 and there is no Montana case law on what effect, if any, these statutes have on creation of zoning and its affect on future agricultural activities. It has been generally held in other states (*e.g.*, Connecticut, Michigan, Pennsylvania) that zoning is a legitimate exercise of police powers that does not violate right to farm laws. Rather, zoning cannot be used to declare current agricultural pursuits a nuisance or violative of regulatory ordinances. Further, it is clear counties may utilize zoning regulations to protect prime agricultural land and encourage agricultural activity, and I believe these goals are being taken into consideration in the current ongoing zoning process in compliance with the Growth Policy in Ravalli County.

One final note in regard to agricultural activities is that §76-2-205(6), MCA (which was discussed above in regard to protest provisions), specifically provides an enlargement of protest rights for owners of property taxed for agricultural purposes, indicating a legislative intent to protect agricultural activities. That being said, by its plain language (“existing agricultural activities”), §76-2-903 applies to only current agricultural activities.

6. May Ravalli County use certain zoning mechanisms?

Yes. Some initial questions have been raised about the propriety of using zoning mechanisms such as transfer of development rights (TDRs), planned unit developments (PUDs), and density bonus provisions. Generally, these are zoning mechanisms that are included in regulations where appropriate to protect property rights, prevent overcrowding of land, and encourage desirable locations for populations.

No Montana statutes specifically outline a process for implementing these mechanisms. However, development mechanisms such as cluster development and PUDs have been specifically defined under the Montana Subdivision and Platting Act (MSPA) to

...facilitate the preservation of Montana's unique landscape...reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area...[and to provide] mechanisms to encourage development approaches that minimize costs to local citizens....

See Compiler's Comments to §76-3-103, MCA. These purposes, articulated by the Montana legislature, are certainly entirely consistent with the purposes of the county zoning enabling statutes to promote the "public health, safety, morals, and general welfare" for county citizens.

More important in regard to whether these tools are appropriate zoning mechanisms is the fact that "Cluster development," "Density Bonus," and "Development rights" (including reference to TDRs), are all specifically defined in the Ravalli County Growth Policy (RCGP). *See "Glossary of Planning Terms,"* pp. 44-53. As discussed in Section 1 of this memo, a growth policy is a "condition precedent" to permanent zoning, and a governing body must be guided by and give consideration to the general policy and pattern of development set out in the growth policy. Further, the RCGP was adopted by the commissioners after several years of an extensive public process, including numerous public meetings and public hearing as well as an advisory vote by electors. During this process, every word and phrase was weighed, measured, scrutinized and debated. Accordingly, it is reasonable to conclude that the RCGP's specific references to these mechanisms was in anticipation that they be available for use as zoning tools.

7. May Ravalli County adopt overall zoning regulations without specific maps?

A final question was raised recently regarding whether the County could adopt general zoning regulations effective in the unincorporated areas prior to and separate from adopting maps describing the exact geographical zone classifications. Under §§76-2-202, -203, and 205, MCA, zoning regulations and zoning district boundaries are referred to separately and it appears that general regulations could be adopted and boundaries or classifications could be later revised in an ongoing process. However, I raise these questions for your consideration regarding the desirability or enforceability of adopting general zoning regulations that do not apply to any specifically designated classified zones.

Note that the protest provisions of §76-2-205, MCA, would certainly apply to both the initial enactment of general regulations, as well as any subsequent adoption of maps revising district boundaries or applying zones for specific pieces of property. In addition to creating a possible "double protest" process, there may also be concerns about interaction of the general regulation with other land use statutes (such as subdivision regulation), which requires compliance with "applicable zoning regulations." In other words, depending upon the text of the regulations, it may be difficult or impossible to determine whether the zoning regulations apply to a specific piece of property.

The practicality and timing of such a process should be discussed fully with the professional agency contracted to assist with Ravalli County's zoning. Any determination of the legality of such proposed general regulations would have to be made in light of the text of those regulations to ascertain whether a map is necessary.

I believe this memo addresses the current list of pending questions as the zoning process continues. Please let me know if there is additional information you would like me to consider or if you have any questions or concerns.

GHC:hs